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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY
Petitioner

versus

JAMES HOWELL LEACH and
KAREN ELAINE LEACH
Respondents

On Petition for Writ of Certiorari
to The Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it reasonable to initiate a "knock and talk" investigation at a back door used as the main public entrance of a residence?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the court whose judgment is under review are: (1) the Commonwealth of Kentucky; and (2) James Howell Leach and (3) Karen Elaine Leach.

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No. __-____

IN THE
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COMMONWEALTH OF KENTUCKY
Petitioner

versus

JAMES HOWELL LEACH and
KAREN ELAINE LEACH
Respondents

On Petition for Writ of Certiorari
to the Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The Attorney General of the Commonwealth of Kentucky, as counsel for Petitioner, Commonwealth of Kentucky, petitions this Court to issue a writ of certiorari to the Kentucky Court of Appeals.

OPINION BELOW

The Commonwealth of Kentucky seeks certiorari review of the unpublished Kentucky Court of Appeals opinion in Leach v. Commonwealth, 2007 WL 2069818, rendered on July 20, 2007.

The Kentucky Supreme Court denied the Commonwealth of Kentucky's Motion for Discretionary Review on October 24, 2007. (See Appendix).

JURISDICTION

The Commonwealth of Kentucky invokes the jurisdiction of this Court pursuant to 28 U.S.C. Sec. 1257(a). The Commonwealth of Kentucky seeks review of a Kentucky Court of Appeals Opinion rendered July 20, 2007, reversing and remanding this case.

The Commonwealth of Kentucky filed a timely Motion for Discretionary Review, which was denied by the Kentucky Supreme Court on October 24, 2007.

CONSTITUTIONAL PROVISION INVOLVED

Constitutional Amendment IV — Search and Seizure: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On April 22, 2005, Detective Matt Carter, McCracken County Sheriff's Department (MCSD), went to the Leaches' home because of a Kentucky Crimestopper's tip regarding alleged illegal drug activity. Detective Carter went with Deputy Sheriff Riddle (MCSD). After receiving the tip, Detective Carter went to the residence and knocked on the back door. The back door was open, but it had a closed screen door on it. Detective Carter smelled the strong odor of marijuana immediately on approaching the back door. The reason that Detective Carter and Deputy Sheriff Jesse Riddle went to the back door first was because the tipster had called back a second time and specified that the officers needed to go to the back door as the Leaches

wouldn't answer the front door. The caller also stated that the Leaches were selling ice, methamphetamine and marijuana. Deputy Riddle informed Detective Carter that he had been to the Leach residence before, on a domestic call, and the whole time he was there everyone came and went through the back door.

Detective Carter knocked on the back door. Mr. Leach yelled, "Come in." Detective Carter didn't go in because Mr. Leach didn't really know who was at the door. Detective Carter attempted to get someone to the door by saying hello. Mr. Leach came to the door. Detective Carter told Mr. Leach who he was and that they had received information that there was illegal drug activity going on at Leach's residence. Mr. Leach told Detective Carter that

there was no such activity and, if there was, he was unaware of it. Detective Carter became aware that there was someone else in the residence. Mr. Leach told the detective that his friend was in the residence. Detective Carter yelled for that individual to come out. Mr. Leach yelled for his friend to come out also. Both men were Mirandized and Detective Carter told them that he smelled marijuana coming from the residence. Mr. Leach admitted that there was an ounce of marijuana in the residence and some weapons. Mr. Leach's friend admitted that he had some marijuana on him. Mr. Leach then informed Detective Carter that Mrs. Leach was also inside the residence. Because the weapons were a concern for officer safety reasons, the detective wanted to secure the residence. Detective Carter received verbal

consent to view the residence. Detective Carter, accompanied by Mr. Leach, entered the residence to get Mrs. Leach. Mrs. Leach was requested to get dressed and come out of the bedroom. This request was complied with and there were no problems.

Mr. Leach went through the residence with Detective Carter. In the den, Mr. Leach pointed out a gun and pointed out some rolling papers. The only room for which Mr. Leach did not give consent to search was the room belonging to his son. Mr. Leach's son had also been mentioned in the Crimestopper's tip, so Detective Carter testified that he obtained a warrant to search this room and several illegal items were found, including a quantity of marijuana, items of drug paraphernalia and

several firearms. Sixteen or seventeen marijuana plants were also found growing.

In McCracken Circuit Court, Mr. and Mrs. Leach filed a motion to suppress the evidence in this case. Mrs. Leach initially filed the motion to suppress the evidence found in the house and Mr. Leach later joined this motion. The Leaches argued that the officers' search of their property violated the Fourth Amendment of the United States Constitution because the police were illegally on the property when they smelled the marijuana. More specifically, the Leaches argued that the officers were illegally on the property because the back door of the house was part of the curtilage and the curtilage was a protected private area not subject to a general search absent a properly issued warrant or

an appropriate exception to the warrant requirement of the Fourth Amendment.

On February 22, 2006, the trial court entered an order denying the Leaches' motion to suppress. In such order, the court made factual findings and legal conclusions. The court concluded that the officers were at the Leaches' residence for a legitimate reason and the officers were legitimately at the Leaches' back door to make contact with the residents. Finally, the court concluded that based upon the facts presented at the suppression hearing, the Leaches were subjected to a lawful search and seizure pursuant to the Fourth Amendment of the United States Constitution.

James Leach entered a conditional guilty plea to one count of firearm enhanced cultivation of marijuana, five or more plants, one count of firearm enhanced possession of drug paraphernalia, second offense, and one count of firearm enhanced possession of marijuana. Mr. Leach received a sentence of five (5) years in the penitentiary, probated for a period of two (2) years. Karen Leach entered a conditional guilty plea to one count of possession of marijuana and firearm enhanced use/possession of drug paraphernalia and received a sentence of two-and-a-half (2 ½) years in prison, probated for two (2) years.

On July 20, 2007, the Kentucky Court of Appeals rendered an opinion reversing and

remanding the trial court's order. The court held that the officers' presence at the back door amounted to a warrantless search and violated the Fourth Amendment of the United States Constitution. The court concluded that the Leaches' back door was within the curtilage of the Leaches' property and the officers were unlawfully on the curtilage when they initially smelled the marijuana. The court rejected the cases cited by the Commonwealth supporting the reasonableness of the officers' decision to approach the back door first to conduct the knock and talk. The court reasoned that in the cases cited by the Commonwealth, the front door was either inaccessible, or the police first knocked on the front door and got no response before proceeding to the back door.

The Commonwealth of Kentucky sought discretionary review in the Kentucky Supreme Court, which was subsequently denied on October 24, 2007.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED IN ORDER TO CLARIFY WHETHER, DURING AN INVESTIGATION, THE FOURTH AMENDMENT PERMITS THE POLICE TO APPROACH ANY ENTRANCE OF A RESIDENCE GENERALLY ACCESSIBLE TO VISITORS.

Summary of Argument

Numerous federal and state courts have held that the police may enter the curtilage to ask questions of the resident without violating the Fourth Amendment. However, there is no United States Supreme Court precedent acknowledging this right. Further, there is an ambiguity in the law as to whether a police officer may approach a residence for a legitimate purpose using any area generally made accessible to visitors, or whether the officer must approach the front door first before moving to

another entrance to locate the occupant. Police officers are constantly approaching residences for legitimate purposes such as serving warrants and conducting investigations. Therefore, a clarification in the law is required so that police officers may carry out their duties in conformity with the Fourth Amendment.

Argument

In Oliver v. United States, 466 U.S. 170 (1984) and United States v. Dunn, 480 U.S. 294 (1987), this Court extended the protections guaranteed by the Fourth Amendment to the curtilage of a house.

A. The police may lawfully enter the curtilage to interview a resident.

Most federal circuits have acknowledged that the police may lawfully enter the curtilage to interview the resident. United States v. Daoust, 916 F.2d 757 (1st Cir.1990); United States v. Reyes, 283 F.3d 446 (2nd Cir.2002) (The route which any visitor to a residence would use is not private in the Fourth Amendment sense, and when police take that route for the purpose of making a general inquiry or for some other legitimate reason, they are free to keep their eyes open); Estate of Smith v. Marasco, 318 F.3d 497 (3rd Cir.2003) ("Knock and talk" exception to the warrant requirement); Rogers v. Pendleton, 249 F.3d 279 (4th Cir.2001); United States v. James, 40 F.3d 850 (7th Cir.1994), modified on other grounds,

79 F.3d 553 (7th Cir.1996) (Police officer seeking to knock on publicly accessible back door to a dwelling was lawfully within the curtilage of dwelling); United States v. Thomas, 120 F.3d 564 (5th Cir.1997) (No Fourth Amendment violation when police entered through the gate of a privacy fence to approach the front door); United States v. Reed, 733 F.2d 492 (8th Cir.1984) (No Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors); United States v. Hammett, 236 F.3d 1054 (9th Cir.2001) (Law enforcement officer may encroach upon the curtilage of a home for the purpose of asking questions of the occupants); United States v. Taylor, 458 F.3d 1201 (11th Cir.2006) (Officers are allowed to knock on a

resident's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may, without probable cause, a warrant, or exigent circumstances).

One scholar put it appropriately when he stated that, "when the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g. walkways, driveways, porches), any observations made from such vantage points are not covered by the Fourth Amendment." Wayne R. LaFave, 1 Search and Seizure: A Treatise on the Fourth Amendment, Sec. 2.3(f) (3d ed.2003).

B. Some circuits have concluded that the police may move away from the front door if it is inaccessible, or if they receive no response.

Some federal circuits have held that the police may move away from the front door to another entrance if the front door is somehow inaccessible, or the officer receives no answer upon knocking. In United States v. Daoust, 916 F.2d 757 (1st Cir.1990), the First Circuit held that when the police found the front door inaccessible, there was no Fourth Amendment violation when they went to the back of the house and looked through a window and observed a gun. In United States v. Raines, 243 F.3d 419 (8th Cir.2001), the Eighth Circuit concluded that there was no Fourth Amendment violation when, after receiving no answer at the front door, the

deputy proceeded to the back of the residence in an attempt to make contact with the resident. In United States v. Hammett, 236 F.3d 1054 (9th Cir.2001), the Ninth Circuit concluded that law enforcement officers who legitimately approached the front door of the defendant's residence for the purpose of asking questions of the occupants, did not violate the Fourth Amendment when, after receiving no response to their knocks at the front door, they circled around the home in a good faith attempt to find another entrance and to notify the occupants of their presence. Finally, in Estate of Smith v. Marasco, 318 F.3d 497 (3rd Cir.2003), the Third Circuit held that when officers are pursuing a lawful objective, their entry into the curtilage after not receiving an answer at the front door did not violate

the Fourth Amendment. The implication from these cases is clearly that the police must approach the front door first before attempting to contact the resident somewhere else on the premises.

C. Some circuits have concluded that the police may approach any entrance accessible to the public.

Nevertheless, several federal circuits have recognized that the police may approach **any** entrance which is made accessible to the public.[1] In United States v. James, 40 F.3d 850 (7th Cir.1994),

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[1]There even seems to be a split within the Eighth and Ninth Circuits. See United States v. Freeman, 426 F.2d 1351, 1352-53 (9th Cir. 1970) (No search when officers spotted marijuana in plain view at the rear of an apartment after climbing a stairway which provided access to both the rear and front of eight second floor apartments); United States v. Reed, 733 F.2d 492, 501 (8th Cir. 1984) (No Fourth Amendment search occurs when the police officers who enter private property restrict their movements to those areas generally made accessible to visitors — such as driveways, walkways, or similar passageways).

modified on other grounds, 79 F.3d 553 (7th Cir.1996), the Seventh Circuit held that where the back door of a residence is readily accessible to the general public, the Fourth Amendment is not implicated when the police officers approach that door in the reasonable belief that it is a principle means of access to the dwelling.

In Alvarez v. Montgomery County, 147 F.3d 354 (4th Cir.1998), the Fourth Circuit declined to adopt the inflexible approach of requiring the police under all circumstances to knock at the front door before attempting to contact the occupant elsewhere on the premises. The court in that case reasoned that the textual "touchstone of the Fourth Amendment is reasonableness," Id. at 358, quoting, Florida v. Jimeno, 500 U.S. 248 (1991), and Katz v.

United States, 389 U.S. 347 (1967). When applying this basic principle, the United States Supreme Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."Alvarez v. Montgomery County, 147 F.3d at 358, quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996).

D. Some state courts have concluded that the police may move away from the front door if it is inaccessible, or if they receive no response.

The state courts have inconsistent opinions with regard to this issue as well. Some states have implicitly or expressly recognized that the police must approach the front door first before attempting to locate the occupant somewhere else on the premises. State v. Lyons, 307 S.E.2d 285

(Ga.App.1983) (Where police officers responding to a complaint were unable to elicit a response at the front door of a residence reasonably believed to be occupied, a subsequent entry into the backyard to reach the back door is a valid intrusion); Miller v. State, 27 S.W.3d 427 (Ark.2000) (Police did not violate the Fourth Amendment by going to the back door of the defendant's home after getting no response at the front door); Gonzalez v. State, 588 S.W.2d 355 (Tex.Crim.App.1979) (Acknowledging that no Fourth Amendment violation occurs when the police go to the back door to contact the resident, but only after first approaching and knocking on the front door); City of Eugene v. Silva, 108 P.3d 23 (Or.App.2005) (For purposes of officers' entry onto residential premises, a homeowner is presumed to

have implicitly consented to entry into the front yard to approach the front door; conversely, such a presumption of implied consent to enter is not ascribed to other areas of the curtilage, and entry onto those areas is presumptively a trespass); State v. Fisher, 154 P.3d 455 (Kan.2007) (Acknowledging that if no one answers the knock at the front door, officers can be justified in knocking on more doors).

E. Some states have recognized that police may approach any entrance accessible to the public.

Other states have held that an officer who approaches the house from any common access route does not violate the resident's reasonable expectation of privacy under the Fourth Amendment. State v. Seagull, 632 P.2d 44 (Wash.1981) (Police with

legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house, and in doing so they are free to keep their eyes open); State v. Domicz, 907 A.2d 395 (N.J.2006) (Law enforcement officer's actions of approaching the back door of the defendant's residence through a gate that separated the driveway from the rear of the residence did not implicate the Fourth Amendment, where the officer did so for purposes of knocking on the back door to speak with the defendant and the position of the parked cars in the driveway led the officers to believe that the back door was used by the residents and visitors); Trimble v. Indiana, 842 N.E.2d 798 (Ind.2006) (The route which any visitor to a residence would use is not private in the Fourth Amendment sense, and thus, if the police take that

route for the purpose of making a general inquiry or for some other legitimate reason, they are free to keep their eyes open); People v. Thompson, 221 Cal.App.3d 923 (1990) (Police with legitimate business may enter areas of the curtilage which are impliedly open to the public, such as access routes to the house); Waldrop v. State, 544 S.2d 834 (Miss.1989) (recognizing that police officers have the right of ingress and egress onto private property).

F. It is reasonable for officers to approach any entrance generally accessible to the public.

The textual touchstone of the Fourth Amendment is reasonableness. Florida v. Jimeno, 500 U.S. 248 (1991) citing Katz v. United States, 389 U.S. 347 (1967). Moreover, this Honorable Court has

consistently eschewed bright line rules such as requiring the police to first approach the front door before attempting to locate the occupants elsewhere on the premises. Finally, the Fourth Amendment does not require an officer to determine which door most closely approximates the main entrance and approach only that door. The Fourth Amendment requires only that officers act reasonably. Therefore, when officers are approaching a residence for a legitimate purpose, it is reasonable for the officers to enter those areas of the curtilage which are impliedly open to use by the public.

G. Detective Carter was reasonable in going to the back door to conduct a "knock and talk."

In this case, the Kentucky Court of Appeals relied heavily on the fact that Detective Carter did not go to the front door first before proceeding to the back door. However, the officers had specific information that the back door was the principle entrance used by visitors. Detective Carter limited his movements to the walkway along the side of the house, which led directly to the back patio where the back door was located. There were no shrubs or fence obscuring the back door and a welcome mat was set out for visitors. Finally, the back door was open with only a screen in place, and when the officers knocked, Mr. Leach yelled for them to come in. The Fourth Amendment requires only that the officers

utilize those access routes generally made accessible to visitors. The facts of this case show that the officers restricted their movements to places open to visitors and the officers' presence at the back door of the Leaches' residence did not violate the Fourth Amendment of the United States Constitution.

CONCLUSION

Wherefore, based upon the foregoing reasons, the Attorney General of Kentucky requests that this Court grant a writ of certiorari to the Kentucky Court of Appeals in this case.

Respectfully submitted,

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Respondents

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APPENDIX TO CERTIORARI PETITION

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APPENDIX

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Supreme Court of Kentucky

2007-SC-0555-D
(2006-CA-1481 & 2006-CA-1486)

COMMONWEALTH OF KENTUCKY MOVANT

V.

MCCRACKEN CIRCUIT COURT
NOS. 2005-CR-0277-001 7 2005-CR-0277-002

JAMES HOWELL LEACH and KAREN ELAINE LEACH RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED October 24, 2007

S/JOSEPH E. LAMBERT
CHIEF JUSTICE

RENDERED: JULY 20, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NOS. 2006-CA-001481-MR and 2006-CA-001486-MR

JAMES HOWELL LEACH and KAREN ELAINE LEACH — APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 05-CR-277

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

STUMBO, Judge.

This consolidated appeal is brought from the convictions of James and Karen Leach. Mrs. Leach appeals a conviction on a charge of firearm enhanced possession of marijuana and firearm enhanced use/possession of drug paraphernalia. She was sentenced to two-and-a-half years in prison, probated for two years. She entered a conditional guilty plea and appeals the denial of a motion to suppress certain evidence obtained during a search of her home.

Mr. Leach also entered a conditional guilty plea which resulted in a sentence of five years, probated for two years, for one count of firearm enhanced cultivation of marijuana, one count of firearm enhanced possession of drug paraphernalia, and one count of firearm enhanced possession of marijuana. Because both cases arise from the same set of facts and the issue raised is identical, they will be heard together.

On April 15 and 16, 2005, the West Kentucky Crimestoppers in McCracken County received anonymous tips. The two tips alleged that the Appellants were dealing drugs, specifically cocaine, methamphetamine and marijuana, out of their house. On April 22, 2005, Detective Matt Carter and Deputy Jesse Riddle went to Appellants' home to investigate. According to the officers, the tipster stated that the Appellants would not answer the front door to the home but would come to the back door. Detective Carter testified that Deputy Riddle had advised him that he (Riddle) had been to the residence before on a previous domestic call and that "everyone" at the house on that occasion used the back door to enter and exit the house. He did not say whether these people were all members of the Leach family. Relying on this information, upon arrival the officers immediately went around to the back door and knocked without first attempting entry via the front door.

Photographs in the record indicate that to reach the back door, the officers had to walk down a driveway, pass a number of parked vehicles and go behind the house to a position not visible from the street. Additional photographs reveal that the back yard was ringed with an overgrowth of

trees and bushes and had a garage in one corner. From the front of the house, the parked vehicles and vegetation appear to conceal the rear of the house completely from the street.

The back door was open, but it had a closed screen door. Upon reaching this back door, Carter smelled the odor of marijuana. When the detective knocked, someone from inside yelled "come in." The officers did not enter because they had not yet identified themselves. Eventually, Mr. Leach came to the door. Detective Carter told Mr. Leach why the officers were there, but Mr. Leach denied knowing anything about drug activity. Mr. Leach did say he had a friend who was also inside the house. The detective instructed the friend to come to the door. Both men were then given the Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Detective Carter told the men that the smell of marijuana was coming from the house. Mr. Leach admitted that there was an ounce of marijuana and some firearms in the house, and that his wife was in the bedroom. At this point, both men were detained and asked for consent to search the house. Mr. Leach consented and took the officers through the house, pointing out the marijuana and guns. Mrs. Leach was also instructed to come out of the bedroom. When the officers came to the room of the Leaches' son, Mr. Leach revoked his consent and would not let them enter the room. The officers then obtained a search warrant and found in the room more marijuana, drug paraphernalia, and firearms.

During the ensuing criminal proceedings, Mrs. Leach filed a

motion to suppress the evidence found in the house. Mr. Leach later joined in this motion. The Leaches' argue that the initial search of the house was improper because no warrant had been issued and there was no applicable exception to the warrant requirement. The Leaches' contend that the officers were illegally on the property when they smelled the marijuana because the back door of the house is part of the curtilage. The curtilage is a protected private area and is not subject to a general search absent a properly issued warrant or an appropriate exception to the warrant requirement. In short, their argument is that the presence of the officers in the protected area was inherently coercive, rendering Mr. Leach's consent invalid.

The motion was denied by the trial court, which concluded that the officers were lawfully at the back door to make contact with the owners of the house and that the back door was open for public use. The open for public use conclusion was derived from the case of Cloar v. Commonwealth, 679 S.W.2d 827 (Ky.App.1984), which will be discussed more fully infra.

Both Appellants argue that their right to be secure from unreasonable search and seizure guaranteed by the 4th and 14th Amendments to the U.S. Constitution was violated when the police officers breached the curtilage of their property without a search warrant and conducted a search by coming to the back door. The Commonwealth responds that the officers were rightly at the back door to affect a knock-and-talk and that valid consent to search the premises was given.

First, we must address the issue of whether the back door was open to the public. The lower court concluded that it was based on the Cloar case mentioned above. In Cloar, a deputy sheriff went to the house of Gerald Gravitt to talk with him in connection with the theft of a chainsaw and other items. The deputy parked in the driveway and then knocked on both the front and back doors, but got no response. He then noticed a cabin by a lake that was further down the driveway. The deputy drove down to the cabin, apparently in search of Gravitt. He went to the back door, which was the one facing his vehicle, and knocked. Receiving no response, he went to the front door, which he found to be padlocked. As he was coming back around the house to his car, the deputy noticed a motorcycle cover which fit the description of one that had been stolen a few months prior. He removed the cover and brought it to the original owner who identified it as the stolen property.

Later that day, the deputy got information that Gravitt was in the cabin. Officers went to the cabin and arrested him. Gravitt moved to suppress the motorcycle cover, contending that it was illegally seized from the curtilage of his residence. The Kentucky Supreme Court disagreed. That court stated that although Kentucky adheres to the rule that the curtilage of a residence may not ordinarily be searched without a warrant, contraband may be seized if it is in plain view and in a protected area. Cloar at 829. The court stated that the rule had evolved saying:

> if a police officer is lawfully engaged in an activity in a particular place and inadvertently observes an object in

> plain view that he or she has probable cause to associate with criminal activity, the officer may seize the property without a warrant. Such a seizure is not infirm under either the United States or Kentucky Constitutions.

Id. at 829-30. A primary issue in Cloar became whether the deputy was in a lawful place at the time he observed the stolen property. If he was, then the seizure was lawful and should not be suppressed. The court found that the deputy was in a lawful position upon seeing the stolen property. It held:

> that a police officer in the furtherance of a legitimate criminal investigation has a legal right to enter those parts of a private residential property which are impliedly open to public use. We limit the permissible scope of this right, however, to driveways, access roads, and as much of the property's sidewalks, pathways, and other areas as are necessary to enable the officer to find and talk to the occupants of the residence. We fail to perceive that such a rule sanctions an unreasonable invasion of privacy. After all, there is nothing unreasonable about a person in broad daylight openly and peacefully walking up to the door of a residence with the honest intent of asking questions of the occupant.

Id. at 831. So the question remains, was the back door impliedly open to public use? We do not think it was.

Curtilage is a protected part of an individual's property under the 4th Amendment of the United States. It is given protection because it is an extension of the home and can be used for intimate activity associated with the home. Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). The United States Supreme Court outlined four factors to be considered in determining whether property fell within the curtilage of one's home. The four factors to be considered are: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the house, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." U.S. v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). When this test is applied to the facts found in the case at bar, it is clear that the Leaches' back door is undeniably part of the curtilage. The back door was concealed from the public roadway by the house itself, vehicles parked in such a manner as to conceal the back yard, and tall trees, shrubbery and the garage from the three remaining sides of the back yard. Additionally, as noted by counsel in the Appellant's brief, the back yard was being used to grow marijuana, which is a use certainly meant to be concealed from passersby. (We note that apparently the officers did not notice the marijuana plants located in pots on a table in back yard until after the search warrant was obtained.) A cursory glance at the photos in the record establish that there was no pathway and the back yard of the property was not otherwise impliedly open to the public which would allow it to fall under the Cloar exception stated above.

Generally speaking, no reasonable member of the public would believe that a back door not visible to the casual observer would be open to him. There could be circumstances where members of the public could think that a back door would be open to the public. For example, if the front door is somehow inaccessible or there is no response to attempts to contact the inhabitants via the front door. See, e.g., Warner v. State, 773 N.E.2d 239 (Ind.2002) (police who received no response at front door properly went to side door). In this case, all we have to suggest that the back door is impliedly open to the public is an anonymous tip and the hearsay statement of one of the police officers that on a previous occasion he had been at the house and noticed that "everyone" used the back door to enter and exit. There was no testimony that those who used the back door included the public or even when this previous visit took place. Considering that the officer's previous visit to the residence was in response to a domestic disturbance, it is logical, without more information, to assume the only people involved were members of the family and that no members of the public were seen using the back door. We cannot in good conscious deem a back door to be impliedly open to public use based on an uncorroborated anonymous tip and the single previous experience of one of the officers.

The Commonwealth offers up a number of cases from other jurisdictions that say an officer may go to the back door to execute a knock-and-talk. However, all these cases state that the officer may do so only if the front door is inaccessible or if they first knocked on the front door and got no response. Neither of these instances was the case here. The officers did

not try the front door, which was accessible. Upon arriving, they went immediately to the back door. This was a violation of the Appellants' curtilage.

Having concluded that the officers were not properly on the curtilage of the Leaches' property, we must then turn to whether the consent given to the officers to search the home was sufficient to cure the violation of the curtilage. Was the consent to search the house valid? We find that the consent was not valid when given. In order for consent to search to be valid, it must be voluntary. "One's consent to a search must be voluntary which means it must result from an essentially free and unconstrained choice rather than from duress or coercion." United States v. Sanchez, 156 F.3d 875, 878 (8th Cir.1998). "The question of voluntariness is to be determined by an objective evaluation of police conduct and not by the defendant's subjective perception of reality." Cook v. Commonwealth, 826 S.W.2d 329, 331 (Ky.1992). Appellants argue that since the officers were in an unlawful position, namely the back door, this was a form of coercion. If this was coercive in nature, then the consent to search would have been involuntary. "The question of voluntariness turns on a careful scrutiny of all the surrounding circumstances in a specific case." Id. "Consent to a search must be free, voluntary, and without coercion of any type." Middleton v. Commonwealth, 502 S.W.2d 517, 518 (Ky.1973). When the consent given by Mr. Leach was obtained, the officers had already intruded upon constitutionally protected property and had confronted Mr. Leach with their conclusion that marijuana was present within the home. Similarly, in Middleton, the officers were upon the property of the

defendant and advised him that they had a search warrant when asking for consent to search. As the court did in Middleton, we find that "there can be no consent under such circumstances," due to the coercive situation. Id.

Because the warrantless search of the property rendered the evidence found pursuant to consent given by Mr. Leach inadmissible, we must reverse and remand for further proceedings.

COMMONWEALTH OF KENTUCKY
MCCRACKEN CIRCUIT COURT
DIVISION NO. 1
INDICTMENT NO. 05-CR-00277-001

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. FINAL JUDGMENT/SENTENCE OF PROBATION

JAMES HOWELL LEACH DEFENDANT

The defendant, having been found guilty by the Court of the crime(s) of **Firearm Enhanced Cultivation of Marijuana 5 or more Plants, Count 2 Firearm Enhanced Use/Possession of Drug Paraphernalia, Second Offense or Subsequent offense, and Count 3, Firearm Enhanced Possession of Marijuana** on February 24, 2006 and the Court having noted there was no agreement reached between the defendant and the Commonwealth.

On the 12th day of May 2006 the defendant appeared in open court with his attorney, Hon. John Johnson, and the Court inquired of the defendant and counsel whether they had any legal cause why judgment should not be pronounced and afforded the defendant and counsel an opportunity to make any statements in the defendant's behalf and to present any information in mitigation of punishment, and the Court having considered conditional discharge, is of the opinion that the defendant is in need of supervision, guidance, assistance and direction that can be provided by the Division of Probation and Parole.

IT IS HEREBY ORDERED and ADJUDGED that the defendant's sentence is fixed at **Five (5) years on Count 1, Firearm Enhanced**

Cultivation of Marijuana five or more plants, five (5) years on Count 2, Firearm Enhanced Use/Possession of Drug Paraphernalia, Second Offense, and four (4) years on Count 3, Firearm Enhanced Possession of Drug Paraphernalia all to run concurrent for a total sentence of five (5) years but entry of Judgment imposing a sentence is hereby withheld, and it is further ORDERED and ADJUDGED that the defendant is sentenced to a period of **probation** of **two (2) years** subject to the conditions specified below:

1. Continued good behavior,
2. Refrain from violating the law in any respect;
3. Comply with the regulations of the Division of probation and Parole and

the directions of the probation officer,

4. Complete the Drug and Alcohol program provided by Probation and Parole and follow any recommendations;

5. Report to the probation and Parole at least once a month and pay a $30.00 supervision fee;

6. Pay Courts Costs in the amount of $270.00 by November 3, 2006 at 10:30 a.m. or appear before this Court and ask for an extension of time; (Motion to waive Court Costs was denied)

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the defendant.

IT IS ORDERED that upon completion of the aforesaid probationary period, the defendant shall be finally discharged, provided the defendant has complied with the above conditions and provided further that no warrant issued with the Court is pending against the defendant, and the defendant's probation has not been revoked.

IT IS ORDERED that the defendant shall be given credit for pre-sentence confinement time of **9** days. FURTHER, the defendant's bond may be released upon entry of this order.

ENTERED from the bench on the 8th day of June 2006, and **DATED** this 9th day of June, 2006.

s/R. JEFFREY HINES, JUDGE
R. JEFFREY HINES, JUDGE
McCRACKEN CIRCUIT COURT
DIVISION NO. 1

CLERK'S CERTIFICATE

It is hereby certified that a copy of the foregoing Order was mailed to the following on this 12th day of June, 2006:

Commonwealth Attorney
Hon. John Johnson
Probation and Parole

MIKE LAWRENCE, CLERK
McCRACKEN CIRCUIT COURT

BY: KAREN CONOLY D.C.

COMMONWEALTH OF KENTUCKY
MCCRACKEN CIRCUIT COURT
DIVISION NO. 1
INDICTMENT NO. 05-CR-00277-001

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. FINAL JUDGMENT/SENTENCE OF PROBATION

KAREN ELAINE LEACH DEFENDANT

The defendant, having been found guilty by the Court of the crime(s) of **Count 3, Firearm Enhanced Possession of Marijuana and Count 4, Firearm Enhanced Use/Possession of Drug Paraphernalia** on February 24, 2006 and the Court having noted there was no agreement reached between the defendant and the Commonwealth.

On the 12th day of May 2006 the defendant appeared in open court with her attorney, Hon. Grant King, and the Court inquired of the defendant

and counsel whether they had any legal cause why judgment should not be pronounced and afforded the defendant and counsel an opportunity to make any statements in the defendant's behalf and to present any information in mitigation of punishment, and the Court having considered conditional discharge, is of the opinion that the defendant is in need of supervision, guidance, assistance and direction that can be provided by the Division of Probation and Parole.

IT IS HEREBY ORDERED and ADJUDGED that the defendant's sentence is fixed at **tow and one half (2 1/2) years on Count 3, Firearm Enhanced possession of Marijuana and, two and one half (2 1/2) years on Count 4, Firearm Enhanced Possession of Marijuana all to run**

concurrently for a total of two and one half (2 ½) years but entry of Judgment imposing a sentence is hereby withheld, and it is further ORDERED and ADJUDGED that the defendant is sentenced to a period of **probation of two (2) years** subject to the conditions specified below:

1. Continued good behavior,
2. Refrain from violating the law in any respect;
3. Comply with the regulations of the Division of probation and Parole and the directions of the probation officer,
4. Complete the Drug and Alcohol program provided by Probation and Parole and follow any recommendations;
5. Continue Drug Counseling

6. Report to the probation and Parole at least once a month and pay a $30.00 supervision fee;

7. Pay Courts Costs in the amount of $270.00 by November 3, 2006 at 10:30 a.m. or appear before this Court and ask for an extension of time; (Motion to waive Court Costs was denied)

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the defendant.

IT IS ORDERED that upon completion of the aforesaid probationary period, the defendant shall be finally discharged, provided the defendant has complied with the above conditions and provided further that no warrant issued with the Court is

pending against the defendant, and the defendant's probation has not been revoked.

IT IS ORDERED that the defendant shall be given credit for pre-sentence confinement time of 7 days. FURTHER, the defendant's bond may be released upon entry of this order.

ENTERED from the bench on the 8th day of June 2006, and **DATED** this 9th day of June, 2006.

s/R.JEFFREY HINES, JUDGE
R. JEFFREY HINES, JUDGE
McCRACKEN CIRCUIT COURT
DIVISION NO. 1

CLERK'S CERTIFICATE

It is hereby certified that a copy of the foregoing Order was mailed to the following on this 12th day of June, 2006:

Commonwealth Attorney
Hon. J. Grant King
Probation and Parole

MIKE LAWRENCE, CLERK
McCRACKEN CIRCUIT COURT

BY: KAREN CONOLY D.C.

COMMONWEALTH OF KENTUCKY
MCCRACKEN CIRCUIT COURT
DIVISION NO. 1

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **ORDER** **05-CR-277**

KAREN ELAINE LEACH and
JAMES HOWELL LEACH DEFENDANTS

* * * * * * * * * * * * * * * * * *

This matter has come before the Court on the Defendant's Motion to Suppress. A hearing was held on Friday, February 17, 2006. Having reviewed the Defendant's Motion, heard testimony and oral arguments and being otherwise sufficiently advised, this Court finds as follows:

1. Detective Matt Carter of the McCracken County Sheriff's Department (MCSD) testified he was given an anonymous tip that there was illegal drug activity taking place at 2215 West Hovenkamp, the defendants' residence. Based on this information, Detective Carter and Deputy

Jesse Riddle of MCSD performed a "knock-and-talk" to disprove the allegations.

2. Detective Carter was given information that in order to make contact with the residents of the home he would have to use the back door and Deputy Riddle confirmed that information based on prior dealings with the residents of 2215 Hovenkamp.
3. Detective Carter testified when he and Deputy Riddle knocked on the back door of the residence the occupants yelled, "Come In". Detective Carter and Deputy Riddle did not enter, because they had not identified themselves. But as they waited, they could smell an overwhelming amount of burning marijuana.
4. Detective Carter testified that after he and Deputy Riddle identified themselves and told the Defendant, James Leach, the reason they were there. He was mirandized and asked about any illegal drug activity and the smell of burning marijuana. The defendant gave them consent to enter and search the entire home, except the room belonging to his adult son. The defendant, James Leach, voluntarily showed Detective Carter where the marijuana and firearms were located.
5. Detective Carter testified that based on

the exclusion of one room from the consensual search it was necessary to obtain a search warrant. Detective Carter and Deputy Riddle obtained a search warrant and several illegal items were found, including a quantity of marijuana, items of drug paraphernalia, and several firearms.

6. Both defendants were arrested subsequent to the search of the home.

Based on the above finding this Court makes the following conclusions of law:

1. Detective Carter and Deputy Riddle had a lawful and legitimate reason to be at the Leach's residence.
2. Detective Carter and Deputy Riddle were lawfully at the rear door to make contact with the residents and not for purposes of searching without a warrant.
3. The rear-door of the Leach's residence was open for public use.
"Although the Fourth Amendment refers only to "persons, houses, papers and effects," courts generally have held that it applies also to the "curtilage," which is the area adjacent to a house and includes the garage....But this does not mean that absent special

circumstances police may never go on the curtilage without a warrant. Courts have held that police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public. Thus, police may walk on the sidewalk and onto the porch of a house and knock on the door if they are conducting an investigation and want to question the owner, and in such a situation the police are free to keep their eyes open and use their senses.... "Cloar v. Commonwealth, 679 S.W.2d 827, 831 (1984).

4. Based on the facts presented at the suppression hearing and Cloar v. Commonwealth (1984), the Defendants were subjected to a lawful search and seizure.

Based on the above-mentioned findings of facts and conclusions of law, this Court **DENIES** the Defendants' Motion to Suppress.

Dated this 22nd day of February 2006.

s/R.Jeffrey Hines
R. JEFFREY HINES,JUDGE

McCRACKEN CIRCUIT COURT
DIVISION NO. 1

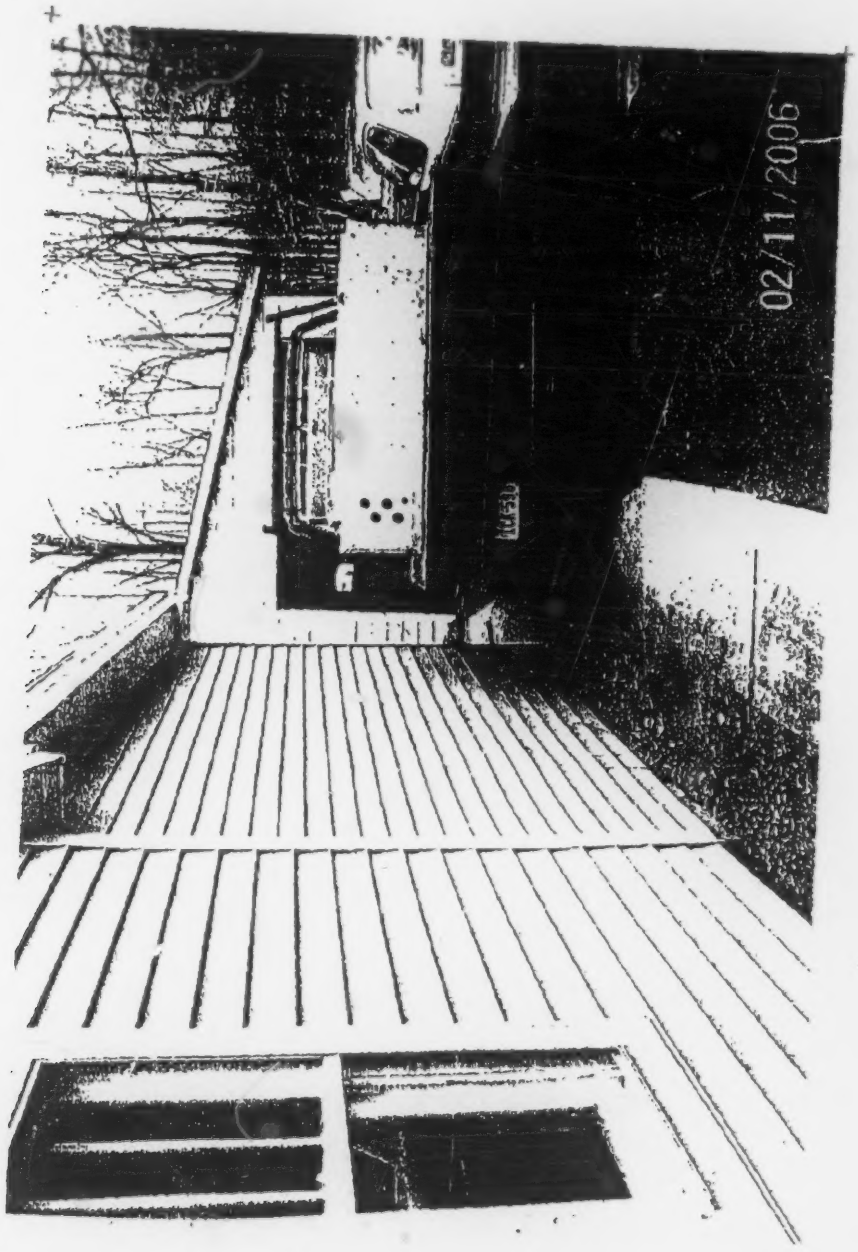
CLERK'S CERTIFICATE

I hereby certify that the foregoing Order was served upon the **Commonwealth's Attorney**, McCracken County Courthouse, Paducah, Kentucky 42003; and on **Hon. Grant King (K. LEACH) and Hon. John Jefferson Johnson, III (J. LEACH),** by mailing a true and correct copy this 22nd day of February, 2006:

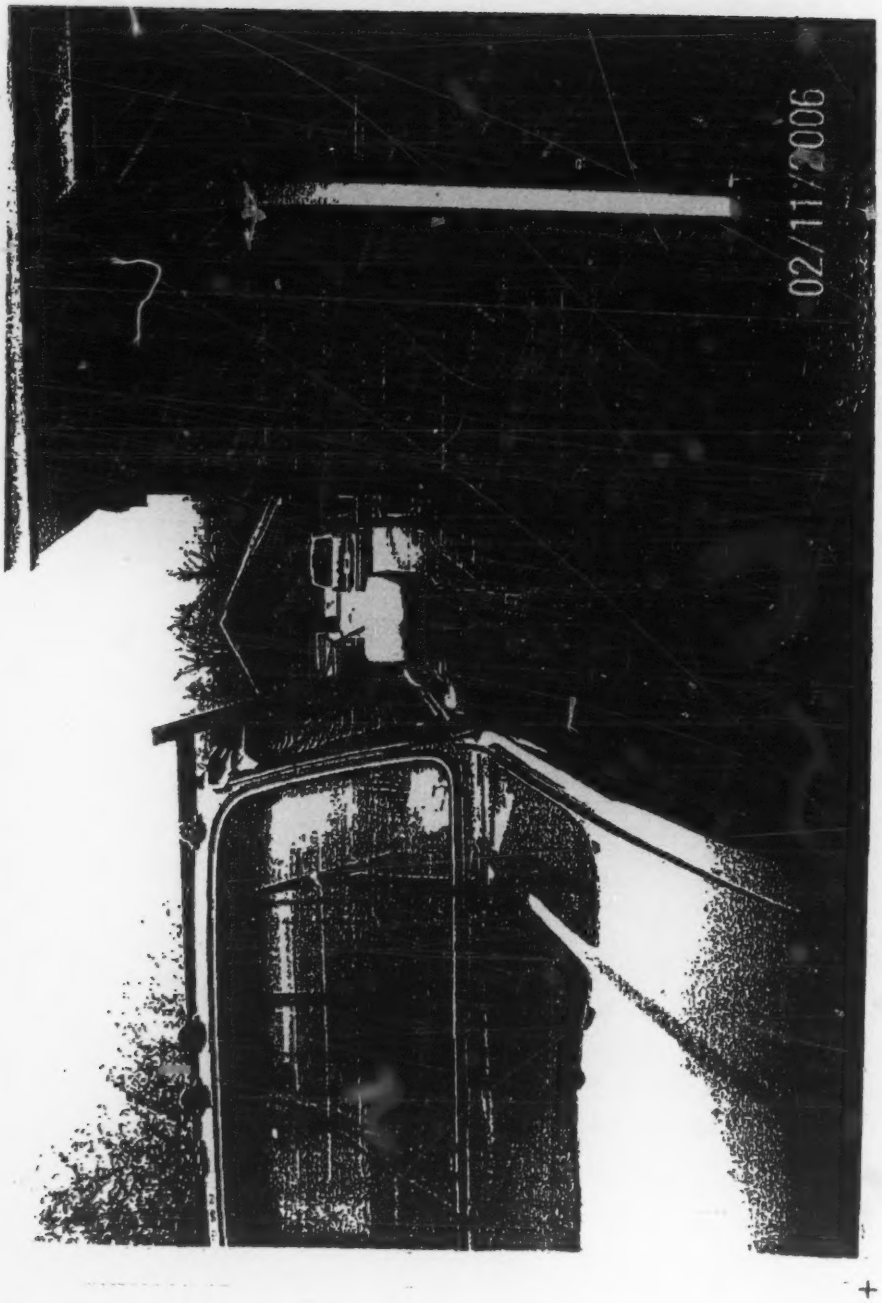
MIKE LAWRENCE, CLERK
McCRACKEN CIRCUIT COURT

BY: JULIE SHEPHERD D.C.

Photograph of the Leaches' back door



Photograph of the side pathway leading to the Leaches' back patio



Photograph of the Leaches' back door

105 (2) FILED 21 JULY 08

No. 07-1213

IN THE
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

JAMES HOWELL LEACH and
KAREN ELAINE LEACH,
Respondents.

On Petition for a Writ of Certiorari to the
Kentucky Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

LISA BRIDGES CLARE, *COUNSEL OF RECORD*
Susan Jackson Balliet
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Counsel for Respondents

July 2008

QUESTION PRESENTED

Was James and Karen Leach's back door impliedly open to the public?

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Photos of Leach home at 2215 West Hovecamp Road, Paducah, Kentucky

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The fact-specific question of whether the Leach back door was impliedly open to the public is not worthy of this Court's review. Even if Petitioner's view of the case were correct, the case would involve only "the misapplication of a properly stated rule of law." *See* S. Ct. R. 10. In any event, the lower court was correct in deciding that the back yard was not impliedly open as photos in the appendix clearly show.

Attempting to make this case sound as though it involves more than the application of the law to the facts, Petitioner claims that there is "ambiguity" in the law over whether police officers must always try the front door of a house before proceeding to the back yard or whether they can approach any area generally open to visitors. Pet. 15. But neither the court below nor *any other case* cited by Petitioner states that police officers must always knock on the front door before trying the back. The conflict claimed by Petitioner does not exist and, even if it did, it would not be presented by this case. The petition for a writ of certiorari should be denied.

The court below held that police officers, in furtherance of a legitimate investigation, can enter parts of private property that are impliedly open to the public. Petitioner appears to agree with that legal standard. *See* Pet. 12 ("[W]hen officers are approaching a residence for a legitimate purpose, it is reasonable for the officers to enter those areas of the curtilage which are impliedly open to the public."). Nonetheless, it disagrees with the court below about whether it was reasonable for the officers in this case to enter James and Karen Leach's backyard.

If this court grants certiarori the entire argument will be whether James and Karen Leach had a back

door which was impliedly open to the public. Based on the evidence here (see Statement of the Case and photos in appendix), this Court's answer will be the same as that of the Kentucky Court of Appeals: No.

STATEMENT OF THE CASE

A. Factual Background

On April 15, 2005 and again on April 16, some unknown person called the West Kentucky Crimestoppers' in McCracken County and gave two tips that would turn out to be largely false. The first tip was that the residents of 2215 West Hovecamp Road, In Paducah, were dealing cocaine and marijuana. The second tip added that they were dealing methamphetamine. There had been no reason to suspect illegal activity at this address and no prior investigation. In the end it would turn out that no one at 2215 Hovecamp was dealing or using cocaine or methamphetamine. Like many Kentucky citizens, Karen and James Leach kept guns in their home. The only illegal substance found was marijuana.

This was not an emergency. It was not until about a week after the Crimestoppers' tips that McCracken County Sheriff's Detectives Jesse Riddle and Matt Carter got around to checking them out and made it over to the Leach residence. The tipster predicted that they would need to go to the back door, because "they won't answer the front door." Riddle had been at this address once before on a domestic violence call. Because Riddle did not testify at the suppression hearing there was no testimony as to how much time had passed since Riddle was at the home.

From the street Carter and Riddle could readily see the front door. It was completely unobstructed and to make access easier, a ramp with a handrail led to

the front porch. Detective Carter admitted that he and Riddle could have first knocked on the front door to see if James or Karen Leach would answer. If the tipster's prediction was right, this would have taken two or three minutes. They chose to skip the front and go straight to the back door based on the anonymous prediction and hearsay evidence of Riddle's single experience.

The back door of the Leach home could not be seen from the front of the property, from either side or from the back. There was a driveway on one side of the house and, on April 22, 2005, it was parked up with vehicles, incldng a truck, some cars and a trailer. All along the outer edge of the driveway there grew a tall, thick hedge of bushes and trees. See photos in appendix. On the other side of the house was a similar barrier of bushy vegetation, augmented by a shed which extended behind the house thereby obscuring the back entry from the neighbors' view. See photos in appendix.

Behind the Leach home was an open field. Still all along the back property line there was a thick row of tall trees and bushes shielding the property from the back. In addition, inside this tree line was a large garage that totally blocked a view of the back door.

To sum up, the entire back yard of James and Karen Leach was enclosed on all sides, on one side by the house, and on the other three sides by trees, bushes and permanent outbuildings. The back door area within the back yard was completely obscured from view by all neighbors and passers-by.

On April 22, 2005, to reach the back door the detectives threaded their way along the driveway through the closely parked vehicles and made a 90 degree left turn behind the house. It was a spring day the main door was open while the screen door remained closed. Detective Carter smelled marijuana

coming from inside. The detectives knocked and from inside James Leach said "come in." Carter called to James that they were drug detectives with the Sheriff's Department. Carter told him they had received information of illegal meth activity and asked James if anything like that was going on at 2215 Hovecamp. James Leach said no.

The detectives told Mr. Leach they smelled his marijuana and James – by now outside – admitted there was marijuana in the house as well as weapons. The detectives handcuffed him, got him to consent to let them enter and search the house, roused Karen Leach from her bedroom, proceeded through the house, found the marijuana and hand guns, detained both James and Karen Leach for three to three and a half hours while they got a warrant, found more marijuana and paraphernalia, and arrested both Karen and James. No trace of methamphetamine or cocaine was found. Just marijuana.

B. Proceedings Below

Both Mr. and Mrs. Leach entered conditional guilty pleas and moved to suppress the evidence found in their house on the ground that the police officers had been illegally on their property when they approached the back door. The McCracken County Circuit Court denied their motion. *Id.* at A-27.

The Kentucky Court of Appeals reversed in an unpublished decision. The court noted that, under Kentucky precedent, "a police officer in the furtherance of a legitimate criminal investigation can enter those parts of a private residential property which are impliedly open to public use." *Id.* at A-7 (quoting *Cloar v. Commonwealth*, 679 S.W.2d 827, 831 (Ky. App. 1984)). Thus, the court explained, the pertinent

question was whether the back door was impliedly open to the public.

The court answered the question in the negative. It pointed out that the back door was concealed from the public roadway and noted that it was being used to grow marijuana, a use not meant to be seen by passersby. It stated that the photos in the record showed that there was no pathway and that the back yard was not otherwise impliedly open to the public.

The court recognized that there could be circumstances in which a back door could be impliedly open to the public. It provided the examples of when the front door is inaccessible or when there is no response to attempts to contact inhabitants by the front door, and it distinguished cases cited by Petitioner by stating that those cases said that an officer may go to the back door only if the front door is inaccessible or the officer knocked on it first and got no response. It pointed out that neither of those instances existed here.

The court noted that, in this case, the only evidence suggesting that the back door was impliedly open to the public was "an anonymous tip and the hearsay statement of one of the police officers that on a previous occasion he had been at the house and noticed that 'everyone' used the back door to enter and exit." It pointed out that there was no testimony that the people who used the back door on Deputy Riddle's previous visit included the public, and, indeed, that because the previous visit had involved a domestic disturbance, it was logical to assume that only family members had been involved. The court concluded that it could not in good conscience deem a back door to be impliedly open to public use based on an uncorroborated anonymous tip and the single previous

experience of one of the officers." Accordingly, it held that the officers had engaged in a warrantless search and that the evidence found was inadmissible.

Kentucky filed a motion for discretionary review by the Kentucky Supreme Court, which was denied.

RESPONDENT OBJECTS TO THE QUESTION PRESENTED.

James and Karen Leach specifically object to the question presented in the Commonwealth's Petition, i.e., "is it reasonable to initiate a 'knock and talk' investigation at a back door used as the main public entrance of a residence?" The Leachs' back door was not used as the main public entrance of their residence, and the Kentucky Court of Appeals ruled that it was not impliedly open to the public.

The Kentucky Court of Appeals properly focused on the use of the property as well as the four factors set out in U.S. v. Dunn, 480 U.S. 294, 301 (1987). The court reviewed all the evidence and stated that even a cursory glance at the photos "establish that there was no pathway and the back yard of the property was not otherwise impliedly open to the public.... On the other hand, a clear, unobstructed walk leads to the front door."

The only question presented by this case, was and is whether or not the Leachs' back door area was impliedly open to public use, a purely factual question, and not a proper question for our nation's highest Court. The Kentucky Court of Appeals properly found the facts, and applied the correct law, which is not in conflict.

REASONS FOR DENYING THE WRIT

A. The Purported Conflict Does Not Exist.

Petitioner's primary argument for certiorari is that there is conflicting caselaw over whether police officers must try the front door of a house before attempting to contact the resident through another entry or whether they may approach any entry generally open to the public. But this purported conflict is illusory. Not a single case cited by Petitioner states that police must always approach the front door before going to the back.

1. With regard to the federal cases cited by Petitioner, Petitioner is correct that *United States v. James*, 40 F.3d 850 (7th Cir. 1994), *Alvarez v. Montgomery County*, 147 F.3d 354 (4th Cir. 1998), *United States v. Freeman*, 426 F.2d 1351 (9th Cir. 1970), and *United States v. Reed*, 733 F.2d 492 (8th Cir. 1994), allow an officer, under certain circumstances, to approach the back of a building without first approaching the front.

Petitioner is also correct that *United States v. Daoust*, 916 F.2d 757 (1st Cir. 1990), *United States v. Raines*, 243 F.3d 419 (8th Cir. 2001), *United States v. Hammett*, 236 F.3d 1054 (9th Cir. 2001), and *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003), allow officers to move away from the front door (under at least some circumstances) if the front door is inaccessible or goes unanswered.

Petitioner errs, however, in claiming that "[t]he implication from [this second category of] cases is clearly that the police must approach the front door first before attempting to contact the resident somewhere else on the premises." Pet. at 21. None of these four

cases states that officers must always knock on an accessible front door; they just address situations either where the officers *did* knock on the front door or where the front door was inaccessible.

For example, in *Daoust*, in which the front door was five feet above the ground with no steps, the First Circuit held that it was not illegal for officers who were engaged in a legitimate attempt to interview a person to go around the back of the house when the front door was inaccessible. 916 F.2d at 758. In doing so, the *Daoust* court "did not... imply that police officers seeking to interview a person are always required to knock on the front door of a residence before they may approach any other public means of access to the dwelling." *James*, 40 F.3d 862 n.4. The First Circuit did not speak to circumstances in which the front door was accessible because it was not faced with such facts. Similarly, in *Raines*, *Hammett*, and *Marasco*, the courts were not presented with circumstances in which officers bypassed accessible front doors, and the courts did not say what they would have concluded under such circumstances.

2. Petitioner's claim that there is a conflict among state cases suffers from the same problem: Although *State v. Lyons*, 307 S.E.2d 285 (Ga. App. 1983), *Miller v. State*, 27 S.W.3d 427 (Ark. 2000), *Gonzalez v. State*, 588 S.W.2d 355 (Tex. Crim. App. 1979), *City of Eugene v. Silva*, 108 P.3d 23 (Or. App. 2005), and *State v. Fisher*, 154 P.3d 455 (Kan. 2007), all allow officers to move away from the front door, under at least some circumstances, if it goes unanswered, none of them states, as Petitioner claims, that the police must *always* "approach the front door first before attempting to locate the occupant somewhere else on the premises." Pet. at 23. Indeed, some of these cases state rules

that would allow the police sometimes to knock on the back door without first approaching the front. *See, e.g.*, *City of Eugene*, 108 P.3d at 107 (allowing entry to backyard if homeowner has "explicitly or implicitly invited entry").

3. The cases cited by Petitioner that *do* consider whether officers can approach a back door without first knocking on an accessible front door tend to state legal rules that are similar to each other and to the rule applied by the court below. Although they do not always use the same terminology, these cases, like the court below, generally consider whether the back door was open to the public. *Compare* Pet. App. A-7 (allowing entrance to parts of property that are impliedly open) *with, e.g.*, *James*, 40 F.2d at 862 (allowing entrance to back door that is readily accessible to the general public if officers reasonably believe it is a principal means of access to the dwelling); *Freeman*, 426 U.S. at 1353 (allowing entrance to area "obviously open to use by any person having a legitimate reason for doing so"); *Trimble v. State*, 842 N.E.2d 798, 802 (Ind. 2006) (allowing entrance to places visitors would be expected to go); *see also* Pet. at 25-27 (seeming to equate "accessible to the public," and "common access route," with "impliedly open to the public").[1]

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[1]The only case in the petition addressing whether an officer can approach the back door without first knocking on the front that does not explicitly state a similar standard is *Alvarez*, where the Fourth Circuit found that it was reasonable for officers to proceed directly to the back yard when there was a sign in the driveway saying "party in back" with an arrow. 147 F.3d at 357-58. That decision does not conflict with the decision below.

In short, Petitioner has not identified a conflict in the caselaw, but simply the truism that courts apply different legal rules to different factual scenarios. When faced with cases in which officers knocked on front doors before proceeding to other parts of the property, courts generally apply rules pertaining specifically to whether officers can move away from front doors. When officers did not knock on front doors before entering others part of property, however, the question of whether officers can move away from front doors is not presented. Thus, when faced with those cases, courts instead apply rules pertaining to when in general officers can enter other parts of the property. But a rule stating that an officer can move away from an unanswered front door and a rule stating that an officer can enter any part of the property that is impliedly open to public use do not conflict.

Indeed, the court below even explained how situations in which the front door is inaccessible or goes unanswered fit within its "impliedly open" rule. According to the Kentucky appellate court, those two situations are "circumstances where members of the public could think that a back door would be open to the public." Pet. App. A-9. In other words, these situations are specific *examples* of what might make a back yard impliedly open. Neither of these examples is present in this case, however, nor were there other circumstances that would have made the back yard impliedly open to the public.

B. Even if It Did Exist, the Conflict Would Not Be Implicated By This Case.

Even if there were a conflict over whether police officers must always try the front door before going around back or whether they can approach any entry

open to the public, the resolution of that conflict would not affect the outcome of this case. Although Petitioner claims that "the Kentucky Court of Appeals relied heavily on the fact that Detective Carter did not go to the front door first before proceeding to the back door," Pet. 29, the court below did *not* adopt a bright-line rule requiring officers to go to the front door first. Rather, it examined whether the back door was open to public use, concluding that it was not. Pet. App. A-7.

Accordingly, if this Court decided that officers always have to go to the front door first, the decision below would have to be affirmed because Detective Carter and Deputy Riddle went directly to the back door. But if the Court decided that officers can use any entry open to the public, the decision below would also have to be affirmed, unless the Court disagreed with the lower court's fact-based conclusion that the Leaches' back yard was not impliedly open to public use. Put differently, although Petitioner claims that "certiorari should be granted in order to clarify whether . . . the Fourth Amendment permits the police to approach any entrance of a residence generally accessible to visitors," Pet. 14, that clarification, on its own, would not determine the outcome of this case.

Thus, in the end, Petitioner is just asking this Court to review the lower court's case-specific determination that the Leaches' back yard was not impliedly open to the public. *Compare* Pet. 30 (claiming that "the facts of this case show that the officers restricted their movements to places open to visitors") *with* Pet. App. A-8 (concluding that the back yard entered by the officers was not impliedly open); *compare also* Pet. i (claiming this case presents the question of whether a police officer can approach "the main public entrance of a residence") *with* Pet. App. A-9 (noting that "[t]here was no testimony that those who used the back door included the public"). The Leaches' back yard, however, was concealed from public view. A thick growth of trees and shrubs along with a parked truck and cars shielded it on one side; thick shrubs, trees, an air-conditioning unit and trailer shielded it from view from the other; and a line of trees and overgrowth of vegetation blocked the yard from view from the open field beyond it. The Leaches had a legitimate expectation of privacy in this enclosed back yard, and the lower court was correct in concluding that it was not impliedly open to public use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 2008

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

COMMONWEALTH OF KENTUCKY, PETITIONER

V.

JAMES HOWELL LEACH AND KAREN ELAINE LEACH, RESPONDENTS

APPENDIX

Photos of Leach home at 2215 West Hovecamp Road, Paducah, Kentucky.....A1 – A5